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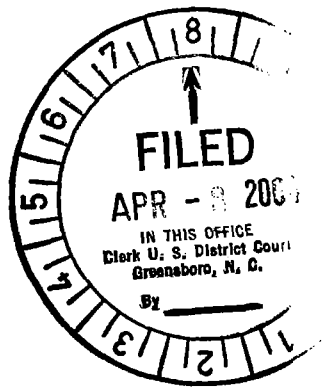
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



TOMMY M. JONES, JR., Plaintiff,	)	
v.	)	1:03CV00122
PHILIP MORRIS USA, INC., Defendant.	)	

MEMORANDUM OPINION

BEATY, District Judge.

I. INTRODUCTION

Plaintiff Tommy M. Jones, Jr. ("Jones") filed this action in the Superior Court of Rowan County, North Carolina alleging (1) violation of the North Carolina Wage and Hour Act; (2) wrongful discharge in violation of public policy based on Defendant's retaliation for Plaintiff's complaints of sexual harassment and sexual discrimination; and (3) discrimination against military personnel in violation of N.C. Gen. Stat. Chapter 127B [Document #1, Ex. A]. Defendant Philip Morris USA, Inc. ("Philip Morris"), a Virginia corporation, removed the matter to this Court on the basis of diversity jurisdiction [Document #1]. Because there is diversity of citizenship and the amount in controversy is greater than $75,000, this matter is properly before this Court. 28 U.S.C. § 1332(a). Defendant then filed a Motion for Summary Judgment [Document # 13] for each of Jones' three claims, which the Court now considers.

II. FACTUAL BACKGROUND

In the light most favorable to Plaintiff, the relevant facts are as follows: Beginning in 1995, Jones was employed as a maintenance technician at Defendant's manufacturing facility in Cabarrus County, North Carolina. During the course of his employment, Jones was a member of a labor union, the International Association of Machinists and Aerospace Workers ("IAM"), and was

employed pursuant to a collective bargaining agreement between IAM and Philip Morris. Under the collective bargaining agreement, Jones could only be discharged for "just cause."

At the time Jones was employed by Philip Morris, Jones was a member of the North Carolina National Guard. While Jones was employed by Philip Morris, he was called to active duty and forced to miss extended periods of work. Upon Jones' return from active duty, he was reinstated by Philip Morris. While Jones does not claim that he was ever denied his previous employment at the conclusion of a period of active duty or National Guard related service, he does claim that he was subjected to negative treatment from at least one of his supervisors as a result of his service in the National Guard.

In January 2002, Jones was disciplined by Philip Morris for allegedly leaving the company facility during working hours without authorization. Although Jones denies the underlying allegations, he admits that he signed a "Last Chance Agreement" with Philip Morris as a result of the incident. Pursuant to the agreement, Jones agreed that if he committed the same offense within the subsequent three years, he would be dismissed. On June 5, 2002, Philip Morris dismissed Jones, claiming that he was away from the company's facility without permission during working hours, which Jones denies. Jones contends that he was actually fired because his supervisor was "out to fire Jones from the minute he returned to the Defendant from active duty military service" and that he was fired in part because he filed a complaint against that supervisor. (Pl.'s Resp. to Def.'s Mot. Summ. J. at 4.)

III. DISCUSSION

A. Summary Judgment Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The defendant seeking

summary judgment bears the initial burden of showing the absence of any issues of material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). However, as the United States Supreme Court noted in Anderson v. Liberty Lobby, Inc., "Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

Under this standard, a genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248, 106 S. Ct. 2510. As a result, the Court will only enter summary judgment in favor of the moving party when "the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the [nonmoving] party cannot prevail under any circumstances." Campbell v. Hewitt, Coleman & Assocs., 21 F.3d 52, 55 (4th Cir. 1994) (quoting Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967)). In reviewing the supported underlying facts, however, all inferences must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). However, the existence of only a "scintilla of evidence" is not enough to defeat a motion for summary judgment. Instead, the evidentiary materials must show facts from which the finder of fact could reasonably find for the non-moving party. Anderson, 477 U.S. at 252, 106 S. Ct. 2505. Moreover, "[a] party may not escape summary judgment on the mere hope that something will turn up at the trial." Ayers v. Pastime Amusement Co., 283 F. Supp. 773, 793 (D.S.C. 1968).

B. Plaintiff's North Carolina Wage and Hour Act Claim

In Jones' first claim, he alleges that Philip Morris failed to properly compensate him for the time he spent "on call" during the course of his employment. As a maintenance technician, Jones

worked in various locations on the company's premises on various days. In order to maintain contact with the maintenance technicians and to be able to dispatch them where they were needed, Philip Morris required maintenance technicians to wear pagers. Philip Morris employed a "trouble call system" under which maintenance technicians were required to have the pagers on while at the facility, but were supposed to log off the system before leaving the facility. However, even when logged off, the pagers could be activated by Philip Morris in case the technicians were needed for an emergency.

Maintenance technicians maintained a flexible work schedule during the course of a particular day. They were allowed a thirty-minute unpaid lunch period every day, and were able to take that lunch period at any time throughout the day. During their lunch period, they were not required to stay on Defendant's premises and were allowed to eat at a restaurant, run errands or otherwise attend to personal matters. However, Jones contends that although he and the other maintenance technicians were logged off of the system during their lunch break, they were commonly paged during their lunch period and required to return to the facility. If they did not return from their lunch break, Jones claims they were subject to discipline. Jones asserts that because he was required to be on-call during his unpaid lunch periods, he was actually working during that time. Therefore, he argues that Defendant failed to compensate him for the additional work time, including such time as would be considered "overtime" in accordance with North Carolina Wage and Hour Act. N.C. Gen. Stat. § 95-25.4 (stating that "[e]very employer shall pay each employee who works longer than 40 hours in any workweek at a rate of not less than time and one half of the regular rate of pay of the employee for those hours in excess of 40 per week").

Defendant responds to Jones' claim by asserting that the North Carolina Wage and Hour Act does not apply to its employment of Jones. Philip Morris points out that the North Carolina Wage and Hour Act excepts by its own language "[a]ny person employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards

Act." N.C. Gen. Stat. § 95-25.14(a)(1). The Court agrees with Defendant's contention that Philip Morris is engaged in the production of goods for commerce, and thus is exempt from the overtime requirement of the North Carolina Wage and Hour Act in relation to its employment of Plaintiff. See Spencer v. Hyde County, 959 F. Supp. 721 (E.D.N.C. 1997) (holding that where the employer-employee relationship at issue was covered by the Fair Labor Standards Act, employer was exempt from the North Carolina Wage and Hour Act). Thus, Plaintiff's claim for violation of the North Carolina Wage and Hour Act is subject to dismissal. However, Plaintiff argues that the standards for overtime pay under the North Carolina Wage and Hour Act and the Fair Labor Standards Act are identical, and that he is entitled to compensation regardless of which act applies to his claim. Although Plaintiff failed to allege a violation of the Fair Labor Standards Act in his Complaint, the Court will address Jones' claim under this statute. See Labram v. Havel, 43 F.3d 918 (4th Cir. 1995) (holding that the plaintiff's failure to plead a valid claim does not warrant dismissal of the action if the facts alleged are sufficient under another valid theory); New Amsterdam Casualty Co. v. Waller, 323 F.2d 20 (4th Cir. 1963) ("[A] party ought not and does not lose his right when his counsel, however formally, advances an erroneous legal theory. If, on the facts disclosed, the party is entitled to some relief, it is the duty of the court to award it.").

The relevant portions of the Fair Labor Standards Act ("FLSA") are 29 U.S.C. §§ 206 and 207. Section 206 requires that employers pay their employees a minimum hourly wage and § 207 requires that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation . . . at a rate not less than one and one-half times the regular rate at which he is employed." Id. The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") has noted that "[t]he two central themes of the FLSA are its minimum wage and overtime requirements." Monahan v. County of Chesterfield, 95 F.3d 1263, 1266 (4th Cir. 1996) (quotation omitted); accord Spencer, 959 F. Supp. at 724 ("To promulgate its limited purpose, sections 206 and 207 of the FLSA set forth specific minimum wage and maximum hour

requirements. Section 206 mandates the hourly minimum wage due to all employees and Section 207 requires that an employer pay overtime at a rate of one and a half times an employee's regular rate for all hours worked in excess of forty per week."). The critical issue is whether the time Plaintiff spent "on call" during his lunch period should be considered in calculating whether Plaintiff was paid a sufficient hourly rate or whether Plaintiff had a "workweek longer than forty hours."

The question of whether time during which an employee is "on-call" is compensable was addressed by the United States Supreme Court in the cases of Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944) and Armour & Co. v. Wantock, 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118 (1944). According to Skidmore, the issue is decided by determining whether an employee was "engaged to wait" or "waited to be engaged." Skidmore, 323 U.S. at 137, 65 S. Ct. at 163. The Supreme Court dictated in Armour, that the critical question is "[w]hether time is spent predominantly for the employer's benefit or for the employee's." Armour, 323 U.S. at 133, 65 S. Ct. at 168. These principles are further clarified by the regulations implementing the Fair Labor Standards Act. 29 C.F.R. § 785.19(a), entitled "Bona Fide Meal Time" provides:

> Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

29 C.F.R. § 785.19. In light of these principles, the Fourth Circuit has recently explained that "the most appropriate standard for compensability is a 'flexible and realistic' one where we determine whether, on balance, employees use mealtime for their own, or for their employer's benefit." Roy v. County of Lexington, 141 F.3d 533, 545 (4th Cir. 1998).

Plaintiff argues that although he was allowed to leave the facility and pursue activities unrelated to work during his thirty-minute lunch period, he was nevertheless "on duty" in that he

had to be constantly prepared to respond to Defendant's emergency calls through his pager. Plaintiff contends that the frequency with which his lunch period was interrupted and the discipline to which he would have been subjected had he ignored the pages, essentially translated his lunch periods into standby or waiting time, which is compensable. See Armour, 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118 (1944). However, the case law applying this standard to employment arrangements similar to that of Plaintiff plainly demonstrates that Plaintiff's lunch periods were not compensable as "on call" time.

In Roy, emergency medical service ("EMS") employees sought compensation from their employer, Lexington County, South Carolina, for unpaid mealtimes the employees were given during the course of their workday. Roy, 141 F.3d at 537. The EMS employees worked shifts of twenty-four and one half hours. Id. at 538. At the conclusion of such a shift they received the next forty-nine hours off. Id. During each shift of twenty-four and one half hours, they were given three meal periods totaling two and one half hours. Id. The employees were free to take their meal periods whenever they chose and were not restricted on where they could go during these periods. Id. Further, the EMS employees "had no official responsibilities during this period of time other than to respond to an emergency call if called upon. In fact, the policy of Lexington County was not to interrupt the lives of these employees during their mealtimes for any reason except for an emergency call." Id. at 545. Despite this policy, the EMS employees were often interrupted during their meal periods. Id. at 546. Although the court did not precisely state the extent of such interruptions, the court indicated that it was approximately twenty-seven percent and "certainly less than half of their meal periods." Id.

Given these facts, the Fourth Circuit held that the EMS employees were not entitled to be compensated for their meal periods. Id. In so holding, the court noted the fact that no restrictions were placed on the movement or activities of the employees as long as they were available to answer emergency calls within two minutes. Id. at 545. The court found it was possible that "very frequent

interruptions would operate to impose a state of readiness as to warrant compensation during all meal periods," but that the less than fifty percent of meals interrupted by the employees was insufficient to meet that threshold. Id. at 546 (citations omitted).

The facts presented by Plaintiff in the case at bar fail to indicate that he regularly suffered a more disruptive meal period than the plaintiffs in Roy. Like the EMS employees, Plaintiff had the ability to take his lunch period whenever he wanted and was free to leave the premises. Plaintiff was not limited in the activities he could pursue on his lunch period and could devote the time to entirely personal pursuits. The only restriction faced by Plaintiff was the possibility that his lunch period would be interrupted in the event of an emergency. Plaintiff presented no evidence that such interruptions occurred with great regularity, or were even as common as those suffered by the plaintiffs in Roy. In light of the decision in Roy and the other applicable caselaw, including that cited by Plaintiff, the Court finds Plaintiff is not entitled to compensation for his meal periods at Philip Morris pursuant to the Fair Labor Standards Act. See also Bright v. Houston Northwest Med. Ctr. Survivor, Inc., 934 F.2d 671 (5th Cir. 1991) (holding that a biomedical equipment repair manager's "on call" time was not compensable where he was "free to be at his home or at any place or places he chose, without advising his employer, subject only to the restrictions that he be reachable by beeper, not be intoxicated, and be able to arrive at the hospital in 'approximately' twenty minutes"); Whitten v. City of Easley, 62 Fed. Appx. 477 (4th Cir. 2003) (holding that "the test is not whether the employee has substantially the same flexibility or freedom he would if not on call, but rather whether they may actually engage in personal activities during 'on call' shifts"). Therefore, even accepting that Plaintiff's Complaint adequately states an FLSA claim, the Court finds that Defendant's Motion for Summary Judgment as to Plaintiff's FLSA claim should be granted.

C. Plaintiff's Wrongful Discharge in Violation of Public Policy Claim

The next claim on which Defendant moves for summary judgment is Plaintiff's claim for

wrongful discharge in violation of public policy. Plaintiff's Complaint asserts that "[b]ecause the Plaintiff complained to management about sex discrimination and sexual harassment by one of the Plaintiff's supervisor [sic] directed at the Plaintiff, the Plaintiff was further harassed and discriminated against by the Defendant." [Document # 1, Exhibit A]. However, in Plaintiff's brief, he notes only that his wrongful discharge claim is based on "violations of express policy declarations contained in the North Carolina General Statutes. Those statutes are the North Carolina Equal Employment Practices Act, the National Guard Act and DAMP [N.C. Gen. Stat. Chapter 127B, Article 2]." (Pl.'s Resp. to Def.'s Mot. Summ. J. at 9.) Regardless of the appropriate basis for Plaintiff's claim of wrongful discharge in violation of public policy, Plaintiff's claim that he was discriminated against in violation of public policy must fail because he is not an employee at will.

As a general matter, the law of North Carolina is that typical employment relationships are "at-will," meaning that employers may end the employment of an employee at anytime without cause. Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971); Burch v. Philip Morris USA, Inc., 396 F. Supp. 2d 646 (M.D.N.C. 2004). However, beginning with the cases of Coman v. Thomas Mfg. Co., 325 N.C. 172, 381 S.E.2d 445 (1989) and Sides v. Duke University, 74 N.C. App. 331, 328 S.E.2d 818 (1985), the North Carolina courts recognized an exception to the at-will doctrine by holding that employers could not discharge an employee in violation of public policy. Although this exception provides previously unavailable recourse for at-will employees, wrongful termination may be asserted "only in the context of employees at will, and not by an employee employed for a definite term or . . . subject to discharge only for 'just cause.'" Trexler v. Norfolk S. Ry., 145 N.C. App. 466, 550 S.E.2d 540 (2001) (citing Houpe v. City of Statesville, 128 N.C. App. 334, 343, 497 S.E.2d 82, 88 (1988)). This prohibition extends to employees who are employed pursuant to collective bargaining agreements and who can be terminated only for "just cause." Burch, 396 F. Supp. 2d at 650. The appropriate remedy for employees who were employed pursuant to a contractual relationship is breach of contract. Claggett v. Wake Forest Univ., 126 N.C. App. 602,

486 S.E.2d 443 (1997). At the time of his discharge, Plaintiff was a member of the International Association of Machinists and Aerospace Workers and was employed pursuant to a collective bargaining agreement between IAM and Philip Morris. Under the collective bargaining agreement, Jones could only be discharged for "just cause." Therefore, because Plaintiff is not an employee at will, his claim under North Carolina law for wrongful discharge in violation of public policy is barred and must be dismissed.

D. Plaintiff's Claim for Discrimination Against Military Personnel in Violation of N.C. Gen. Stat. Chapter 127B, Article 2.

Plaintiff's final cause of action seeks redress from Defendant for violation of N.C. Gen. Stat. Chapter 127B, Article 2 entitled "Discrimination Against Military Personnel." N.C. Gen. Stat. Chapter 127B, Article 2 prohibits public discrimination, private discrimination and employment discrimination against "any officer, warrant officer or enlisted person of the military or naval forces of the State or of the United States because of their membership therein." N.C. Gen. Stat. § 127B-11. However, N.C. Gen. Stat. Chapter 127B, Article 2 provides only that "[a]ny person who violates the provisions of this Article shall be deemed guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 127B-15. The language of the statute gives no indiction that the legislature intended to provide for a private right of action for violation of this particular statute. In the absence of an explicitly stated private right of action, it is generally not within the province of the Court to create one. Vanasek v. Duke Power Co., 132 N.C. App. 335, 511 S.E.2d 41 (1999) (holding "[o]ur case law generally holds that a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute"). Because there is no private right of action provided for violation of N.C. Gen. Stat. Chapter 127B, Article 2, Plaintiff's claim based upon N.C. Gen. Stat. Chapter 127B, Article 2 must fail.

If a private right of action exists for discrimination against National Guardsmen, it is clear that such a remedy would be based upon N.C. Gen. Stat. Chapter 127A which was "intended by

the North Carolina legislature to be the exclusive [remedy] for National Guard servicemen alleging employment discrimination arising from their servicemen's status." Lederer v. Hargraves Tech. Corp., 256 F. Supp. 2d 467, 474 (W.D.N.C. 2003). Although Plaintiff's Complaint does not specifically allege any violation of N.C. Gen. Stat. Chapter 127A by Philip Morris, Plaintiff argues in his brief that Defendant's actions constitute a violation of Chapter 127A, thus entitling him to relief. Assuming *arguendo* that Plaintiff has sufficiently raised this issue, the Court will address Plaintiff's claim as such.

Unlike N.C. Gen. Stat. 127B, N.C. Gen. Stat. Chapter 127A, Article 16, entitled "National Guard Reemployment Rights," does provide for a private right of action for National Guardsmen who have been denied reemployment or otherwise discriminated against as a result of their service in the National Guard. In fact, this statutory scheme details two separate avenues that an aggrieved Guardsman may pursue in seeking redress for adverse employment actions. The first avenue is provided by N.C. Gen. Stat. §§ 127A-202 and 203. Section 202 requires a Guardsman's former employer to restore the Guardsman to his previous position "[u]pon release from State duty." N.C. Gen. Stat. § 127A-202. Section 202 is enforced by § 203 which allows the superior court in the employer's district to "require the employer to comply with G.S. 127A-202." Alternatively, if a Guardsman has suffered a denial of reemployment, or other adverse treatment by an employer, as a result of his or her service in the National Guard, the Guardsman may pursue a remedy through N.C. Gen. Stat. § 127A-202.1. Section 202.1 provides that a Guardsman who has been denied "initial employment, reemployment, retention in employment, promotion, or any benefit of employment" may seek redress through the procedures of "Article 21 of Chapter 95 of the General Statutes," otherwise known as the Retaliatory Employment Discrimination Act ("REDA"). The United States District Court for the Western District of North Carolina recently detailed the procedural requirements and potential benefits of REDA in Lederer:

> Article 21 of Chapter 95 of the General Statutes refers to the state statutory scheme known as the Retaliatory Employment Discrimination Act

> ("REDA"). REDA provides for a scheme of administrative enforcement of certain rights, and is similar to the administrative scheme utilized in Title VII employment discrimination cases. REDA requires that an employee file a written complaint with the Commissioner of Labor within 180 days of the alleged discrimination. N.C.G.S. § 95-242(a) (2001). The Commissioner is required to investigate the claim and determine whether discrimination occurred, such determination to be made within 90 days of the filing of the complaint. Id. The employee may request a right-to-sue letter 180 days after filing the complaint with the Commissioner of Labor. Id. § 95-242(c). Within 90 days of receiving a right-to-sue letter, the employee may commence a civil action against his employer in superior court. Id. §§ 95-243(a),(b). The employee may seek, specifically, an injunction, reinstatement of employment and benefits, and compensation for lost wages and other economic losses. Id. § 95-243(c). In addition, the employee may also be entitled to costs and fees, as well as treble damages, if he prevails. Id.

Lederer, 256 F. Supp. 2d at 473. Thus, a Guardsman who has been denied reemployment upon release from State duty may pursue an action through the superior court as detailed in §§ 202 and 203. Alternatively, a Guardsman who has suffered denial of reemployment, or a litany of other adverse employment actions, may pursue a remedy through the administrative scheme of REDA as provided by § 202.1. As stated in Lederer:

> The legislature created a scheme whereby a plaintiff would have two choices for vindicating the rights afforded under the statutes: 1) exhaust the administrative remedies afforded under REDA, obtain a right-to-sue letter, sue in North Carolina superior court, and be entitled to some enhanced remedies, including attorney's fees (N.C.G.S. § 127A-202.1), or 2) forego the administrative and procedural requirements and time schedules required by section 127A-202.1 and simply sue in superior court to receive compensation for loss of wages and benefits suffered as a result of the adverse employment decision (sections 127A-202 and 127A-203). Thus, the plaintiff may choose to follow more stringent procedural requirements and be entitled to greater remedies, an easier, more determinable burden of proof, and treble damages, or he may sue for reinstatement and compensation in superior court at the outset, without engaging in the four-month administrative process.

Lederer, 256 F. Supp. 2d at 475. As dictated by the plain language of §§ 202 and 203, the only action that may be pursued through a direct action in superior court, is one for refusal of a Guardsman's previous employer to reemploy the Guardsman at his previous position. If redress is sought for any other type of adverse behavior by an employer, the Guardsman must navigate the procedure dictated by § 202.1 and REDA. While the provisions of § 202.1 provide for a broader cause of action encompassing a wider range of adverse employment actions by past and potential

employers, they also provide notably more stringent procedural requirements, namely that the plaintiff must exhaust his administrative remedies and obtain a right-to-sue letter.

In the case at bar, Plaintiff does not claim that he was denied reemployment to his previous position after a period of active service. Therefore, Plaintiff has no cause of action under §§ 202 and 203. Instead, Plaintiff claims adverse employment actions that may only be addressed through a cause of action under § 202.1. Unfortunately, the record contains no indication that Plaintiff followed the procedural requirements required by § 202.1 or REDA. All the evidence before the Court indicates that Plaintiff failed to exhaust the required administrative remedies and failed to acquire a right-to-sue letter before bringing his action. Therefore, Plaintiff is not entitled to maintain an action under either §§ 202 and 203 or § 202.1, and his claim for discrimination as a result of his service as a National Guardsman must be dismissed.

IV. CONCLUSION

In summary, Plaintiff's claim for overtime compensation under the North Carolina Wage and Hour Act and the FLSA is dismissed because, given the particular facts in this case, the requirement that Plaintiff be "on call" during his lunch breaks is insufficient as a matter of law to make such time compensable. Additionally, Plaintiff may not maintain a claim for wrongful discharge in violation of public policy because he is not an employee at will. Finally, Plaintiff's claim for discrimination as a result of his service as a National Guardsman must be dismissed because N.C. Gen. Stat. §§ 127B does not provide for a private right of action. Furthermore, to the extent that Plaintiff has raised a claim pursuant to N.C. Gen. Stat. §§ 127A-202 and 203, these provisions of the statute only provide a remedy for Guardsmen who have been denied reinstatement upon return from active duty, which is not the case asserted here. Alternatively, to the extent that remedies under N.C. Gen. Stat. § 127A-202.1 are available to Plaintiff, the Court has determined that Plaintiff has not met the procedural requirements so as to maintain an action under N.C. Gen. Stat. § 127A-202.1. Therefore, Defendant's Motion for Summary Judgment [Document #13] is granted in all respects. An Order and Judgment consistent with this Memorandum Opinion shall

be filed contemporaneously herewith.

This, the 8th day of April, 2004.

United States District Judge